IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. 480

LOUIS McNEESE, JR., A Minor, By MABEL McNEESE, His Mother And Next Friend, et al.,

Petitioners,

vs.

BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT 187, CAHOKIA, ILLINOIS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONERS.

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OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Illinois is reported at 199 F. Supp. 403. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 305 F. 2d 783.

JURISDICTION.

The judgment of the Court of Appeals was entered July 5, 1962 (R. 31-32). The Petition for Writ of Certiorari was filed in this Court October 3, 1962, and the writ was granted December 10, 1962 (R. 32).

This Court has jurisdiction under 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED.

1. Whether, where plaintiffs sought equitable relief against public school segregation, invoking federal court jurisdiction under the Civil Rights Acts, the court erred in dismissing the case on the ground that plaintiffs must exhaust state administrative remedies before filing a suit.

2. Whether a state procedure requiring a hearing before an official without power to grant relief, who can merely request that the State Attorney General seek relief in a state court, is an inadequate, uncertain and partially judicial procedure which need not be exhausted as a prerequisite to the grant of equitable relief in the federal courts to correct racial segregation in public schools.

3. Whether the court below erred in requiring resort to a procedure inadequate because of its unavailability to individuals who do not obtain the signatures of 50 persons on a complaint to the administrative officials.

STATUTES INVOLVED.

1. This case involves Illinois Revised Statutes, 1961, Chapter 122, Section 22-19, which provides as follows:

> "Sec. 22-19. Upon the filing of a complaint with the Superintendent of Public Instruction, executed in duplicate and subscribed with the names and addresses of at least 50 residents of a school district or 10%, whichever is lesser, alleging that any pupil has been excluded from or segregated in any school on account of his color, race, nationality, religion or religious affiliation, or that any employee of or applicant for employment or assignment with any such school district has been questioned concerning his color, race, nationality, religion or religious affiliation or subjected to discrimination by reason thereof, by or on behalf of the school board of such district, the Superintendent of Public Instruction shall promptly mail a copy of such complaint to the secretary or clerk of such school board.
>
> "The Superintendent of Public Instruction shall fix a date, not less than 20 nor more than 30 days from the date of the filing of such complaint, for a hearing upon the allegations therein. He may also fix a date for hearing whenever he has reason to believe that such discrimination may exist in any school district. Reasonable notice of the time and place of such hearing shall be mailed to the secretary or clerk of the school board and to the first subscriber to such complaint.
>
> "The Superintendent of Public Instruction may designate an assistant to conduct such hearing and receive testimony concerning the situation complained of. The complainants may be represented at such hearing by one of their number or by counsel. Each party shall have the privilege of cross examining witnesses. The Superintendent of Public Instruction or the hearing

officer appointed by him shall have the power to subpoena witnesses, compel their attendance, and require the production of evidence relating to any relevant matter under this Act. Any Circuit or Superior Court of this State, or any judge thereof, either in term time or vacation, upon the application of the Superintendent of Public Instruction or the hearing officer appointed by him, may, in its or his discretion, compel the attendance of witnesses, the production of books, papers, records or memoranda and the giving of testimony before the Superintendent of Public Instruction or the hearing officer appointed by him conducting an investigation or holding a hearing authorized by this Act, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before said court. The Superintendent of Public Instruction or the hearing officer appointed by him may cause the depositions of witnesses within the State to be taken in the manner prescribed by law for like depositions in civil actions in courts of this State, and to that end compel the attendance of witnesses and the production of books, papers, records and memoranda. All testimony shall be taken under oath administered by the hearing officer, but the formal rules pertaining to evidence in judicial proceedings shall not apply. The Superintendent of Public Instruction shall provide a competent reporter to take notes of all testimony. Either party desiring a transcript of the hearing shall pay for the cost of such transcript. The hearing officer shall report a summary of the testimony to the Superintendent of Public Instruction who shall determine whether the allegations of the complaint are substantially correct. The Superintendent of Public Instruction shall notify both parties of his decision. If he so determines, he shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of.

"The provisions of the 'Administrative Review Act,' approved May 8, 1945, and all amendments and modifications thereof and the rules adopted pursuant thereto shall apply to and govern all proceedings for the judicial review of any final decision rendered by the Superintendent of Public Instruction pursuant to this Section."

2. This case also involves Title 42, United States Code, Section 1983, which provides:

1983. *Civil action for deprivation of rights.*— Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. This case also involves Title 28, United States Code, Section 1343(3):

1343. *Civil rights.*—The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • • • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

STATEMENT.

This action was commenced in the United States District Court for the Eastern District of Illinois on September 12, 1961, by a group of Negro school children and their parents residing in St. Clair County, Illinois, and attending schools in Community Unit School District No. 187. The complaint named as defendants the Board of Education for Community Unit School District No. 187; the County Superintendent of Schools for St. Clair County, Illinois; and the Superintendent of Schools for School District No. 187.

Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. 1343(3) as authorized by Title 42, U.S.C., §1983 to redress the deprivation of rights secured by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The action was brought pursuant to Federal Rules of Civil Procedure, Rule 23(a)(3) "on behalf of all other Negro children and their parents in Centreville, Illinois who are similarly situated and affected by the policy, practice, custom and usage complained of herein" (R. 3).

Defendants moved to dismiss the complaint; plaintiffs were granted leave to amend the complaint; and the defendants' motion to dismiss was extended to attack the amended complaint (R. 2). The District Court heard arguments on the motion to dismiss October 6, 1961 (R. 2) and on November 24, 1961, entered an order granting defendants' motion and dismissing the amended complaint (R. 15).

Because the case was decided on the pleadings, a detailed description of the amended complaint is necessary. It was alleged that the minor plaintiffs are Negro children attending the public elementary schools in Community Unit School District No. 187 (R. 3) which are under the jurisdiction, management, and control of the several defendants (R. 3); that the questions presented by the action are common to all Negro children in the school district, and that the members of the class plaintiffs represent are so numerous as to make it impracticable to bring them all individually before the court, but that the class was fairly and adequately represented (R. 3-4). It was alleged that the defendants were charged by Illinois law with the duty of maintaining and operating a public school system in District No. 187; that they are presently operating public schools in the area in purported pursuance of said laws; that the defendant school board established and maintained within the District various free schools organized as elementary, junior high and high schools.

It was further alleged that defendants were pursuing a policy, custom and practice for determining the assignment of pupils to the elementary schools in the district generally known as the "neighborhood school policy" or "attendance area policy" by which children are compelled to attend schools in attendance areas where they reside and are not permitted to attend schools in other areas except under special circumstances not applicable to the plaintiffs or the class represented and with certain other exceptions which are described below.

The complaint alleged further that the defendants operate elementary schools known as the Chenot School and and Centreville School and approximately four other schools, each of which had a prescribed attendance area

(R. 5). Plaintiffs alleged that the Chenot School which began operation in 1957, "was planned and built, and its attendance area boundaries were so drawn as to make it an exclusively Negro school in its student enrollment" (R. 5); and that Negroes, including plaintiffs, in the community lived within well-defined geographic areas known as ghettoes which were well known to the defendants at the time the boundaries of the school attendance areas were established (R. 5). It was alleged that as a result of the defendants' adoption and pursuance of the attendance area policy, defendants have created and do maintain racially segregated public elementary schools and that the minor plaintiffs are compelled to attend such a racially segregated school by the defendants (R. 6). In explanation it was asserted that prior to 1957 when the Chenot School was opened, Negro elementary pupils residing in what is now the Chenot attendance area were assigned to the Centreville School; that Negro children were compelled to attend classes at Centreville School exclusively in the afternoon, while white children in the same school attended classes exclusively in the morning, with the exception of certain "slow" white pupils who attended classes throughout the day (R. 6); that when the Chenot School was opened in 1957, "all or practically all the children of elementary school age who resided in the Chenot attendance area were Negroes, a result intentionally achieved by the defendants by the manner in which the Chenot attendance area boundaries are drawn, in pursuance of a plan to make Chenot School an all-Negro school in student enrollment" (R. 6).

It was alleged that since 1957, because of overcrowding in the adjacent Centreville School area, certain fifth and sixth grade classes at the Centreville School were trans-

ferred to Chenot School; that these classes consisted of approximately 97% white and 3% Negro students; and that these classes were maintained intact as separate classes within Chenot School "in pursuance of [defendants'] design to maintain separate and racially segregated educational facilities for Negro school children, or as nearly so separated and segregated as practicable" (R. 6-7). It was alleged that as a result of the foregoing policy during the 1960-61 school year (the one next preceding the filing of the complaint) there were no white children of elementary school age residing in the Chenot attendance area; that the enrollment at the Chenot School consisted of 251 Negro students and 254 white students; that all these white students were in the fifth and sixth grade classes transferred from the Centreville School as described above; that only eight Negro students were in classes with white students (R. 7); that at the Chenot School there were 10 classes with only Negro students, three classes with only white students, and five classes among which eight Negro students were divided along with about 146 white pupils.

It was alleged that except for the eight Negro students at Chenot School who were transferred from Centreville School, all Negro students within the school "attended classes located together in one part of the school building, separate and apart from the white students, and were further compelled to use entrances to and exits from the school building separate from those used by the white students" (R. 8).

It was alleged that the described conditions were continuing and current (R. 8), and that "despite requests, demands and pleas to the defendants to cease and desist" they had failed and refused to desegregate the schools under their jurisdiction and were acting so as to perpetu-

ate the system of segregated schools and facilities contrary to the Constitution of the United States (R. 9); and that the defendants' actions in drawing boundary lines of the attendance area and in "creating and maintaining racially segregated classes and separate educational facilities," and in compelling minor plaintiffs to attend a racially segregated school deprived plaintiffs of the equal protection of the laws and due process of the law as guaranteed by the Fourteenth Amendment (R. 9). It was alleged that the defendants' action caused the plaintiffs irreparable injury which will continue unless defendants are enjoined by the court and that any other relief to which plaintiffs could be remitted "would be attended by such uncertainties and delays as to deny to plaintiffs substantial relief to which they are entitled" (R. 10).

Plaintiffs further alleged that they had not exhausted certain administrative remedies provided by the Illinois law "for the reason that the remedy there provided is inadequate to provide the relief sought" (R. 10).

The complaint prayed for declaratory relief adjudging the defendants' practices at the Chenot School to be in violation of the Fourteenth Amendment and sought an injunction against these same practices. The complaint also requested that the court require the defendants to submit to the court a plan for compliance with "deliberate speed" in order to register the minor plaintiffs in racially integrated public elementary schools, and for any other appropriate relief (R. 11).

The defendants' motion to dismiss asserted that the complaint failed to state a claim upon which relief could be granted stating, *inter alia*, that the plaintiffs have not exhausted procedures under certain Illinois laws, namely, "Section 22-19 of the School Code" (R. 12-13).

The provisions of Ch. 122, §22-19 of the "Illinois School Code of 1961" (enacted in 1961) can be summarized as follows:

If a complaint is filed with the Illinois Superintendent of Public Instruction executed in duplicate by at least 50 residents of a school district or 10%, whichever is lesser, alleging that any pupil "has been excluded from or segregated in any school on account of his color, race, nationality, religion or religious affiliation," or that there has been discrimination with respect to any employee or applicant for employment of a school district on these grounds by or on behalf of any school board, that the Superintendent of Public Instruction shall mail a copy of such complaint to the named school board. (The statute deals only with racial discrimination and with no other type of controversy.) Therefore, the Superintendent of Public Instruction is required to set a date for a hearing on the allegations in the complaint not less than 20 nor more than 30 days after its filing.

It is also provided that the Superintendent may set the date for a hearing "whenever he has reason to believe that such discrimination may exist in any school district." The statute contains provisions for hearings to be conducted by the Superintendent or an assistant, for the parties to be represented by counsel, for parties to have the privilege to cross examine witnesses, and for the Superintendent to have a subpoena power enforceable by the courts. It is also provided that the Superintendent might take depositions as in civil actions and for testimony to be taken under oath and transcribed by a competent reporter.

Following the hearing, the hearing officer is required to "report a summary of the testimony to the Superintendent of Public Instruction who shall determine whether the allegations of the complaint are substantially correct." The statute provides that the "Superintendent of Public Instruction shall notify both parties of his decision." It further provides that if he so determines, the Superintendent "shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of." It should be noted that the statute contains no other provisions for action by the Superintendent of Public Instruction except those just mentioned, e.g., a determination of whether or not the allegations of the complaint are "substantially correct" and a request to the Attorney General to apply for relief in the courts.

The statute also provides that any final decision rendered by the Superintendent of Public Instruction pursuant to this section may be reviewed under the provisions of the "Administrative Review Act" (see Smith-Hurd Ann. Stats. Ch. 110, Sec. 264, et seq.).

Plaintiffs responded to the motion to dismiss asserting, *inter alia*, that plaintiffs' action under 42 U.S.C. §1983 "need not be preceded by the exhaustion of any state remedies"; and that the state remedies referred to by the defendants "are neither administrative, adequate or available to the plaintiffs".

The District Court filed an opinion on November 24, 1961 (R. 16-22), in which it recapitulated the pleadings and proceedings in that court and set forth its reasons for dismissing the complaint. The court stated that it was not deciding whether plaintiffs had been denied equal protec-

tion of the laws but only whether the court could entertain the action in view of the fact that plaintiffs admittedly had not exhausted any state administrative remedies available under Illinois law (R. 22). The court sustained the defendants' motion to dismiss, and ordered the amended complaint dismissed because of plaintiffs' failure to exhaust the "remedy" provided by the Illinois School Code (Smith-Hurd Ann. Stats., Ch. 122 §22-19).

The court rejected plaintiffs' argument that the relevant Illinois statute did not provide an adequate procedure in that the remedy, if any, was judicial rather than administrative, and also rejected plaintiffs' arguments that the remedy was inadequate in that the statute required 50 persons to make a complaint to the Superintendent of Public Instruction, and in that it provided for an action to be brought by the State of Illinois in the Illinois courts. The Court said that the Superintendent of Public Instruction was required by the statute to conduct a hearing to determine the validity of complaints, and that "in all likelihood" plaintiffs would have had "little difficulty in obtaining the number of signatures required" (R. 22).

The court asserted that by ignoring the statute plaintiffs had deprived the State of Illinois of the "opportunity to rectify its own wrong if it is found that one does exist" (R. 22); and held that plaintiffs' "mere assertion" that the administrative remedy was inadequate was insufficient to demonstrate that the remedy was "in fact ineffective to produce the result attempted by the statute and desired herein" (R. 22).

On plaintiffs' appeal the Court of Appeals for the Seventh Circuit affirmed (R. 31-32). The Court of Appeals similarly determined that the action should be dismissed

for failure to exhaust the remedies provided by the Illinois law, and rejected plaintiffs' arguments that under the facts alleged they were not required to exhaust the remedy provided, that the remedy is not administrative but judicial, and that the remedy is inadequate. The Court of Appeals read plaintiffs' complaint as failing to "allege school board policies which are unconstitutional in themselves" (R. 29) and thus asserted that plaintiffs were required to resort to the remedy provided in the Illinois School Code. The Court also found the statute's requirement of 50 signatures not to be unreasonable "since the function of the requirement is similar to that of a class suit, that is, one of convenience and orderly procedure for presentation in a common cause many individual complaints instead of many individual particular causes" (R. 30). The Court also asserted that the statute gave the Superintendent of Public Instruction power to initiate a hearing whenever he has reason to believe discrimination may exist; that plaintiffs had not requested him to initiate such a hearing; and that if in practice "an individual is denied the remedy he may then turn to the federal courts" (R. 30).

Plaintiffs' petition for a writ of certiorari was allowed by an order entered December 10, 1962 (R. 30).

ARGUMENT.

A.

THE EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES IS NOT A PREREQUISITE TO FILING SUIT IN A FEDERAL COURT UNDER THE CIVIL RIGHTS ACT SEEKING DECLARATORY AND INJUNCTIVE RELIEF AGAINST A RACIALLY SEGREGATED PUBLIC SCHOOL SYSTEM.

Petitioners brought this action pursuant to federal civil rights statutes conferring jurisdiction on the United States District Court, 28 U.S.C. §1343(3); 42 U.S.C. §1983.

The complaint asserted that plaintiffs, Negro citizens, were being deprived of rights under the due process and equal protection clauses of the Fourteenth Amendment[1] by defendants, who are state officers and a state agency operating a system of public schools pursuant to state law, in that defendants were deliberately segregating plaintiffs and other Negro children, principally by planning school attendance areas on a racial basis to conform to the boundaries of Negro ghettoes so as to create an all-Negro school area, and by practices designed to segregate Negro from white pupils within the same school building. The complaint alleges other actions and policies which enforce segregation, and that despite demands upon the defendants to abandon these practices the policies were being continued.

Under *Brown* v. *Board of Education*, 347 U.S. 483, and *Cooper* v. *Aaron*, 358 U.S. 1, the complaint plainly states

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[1] Although the complaint did not mention 42 U.S.C. §1981, this statute also provides for the equal rights of citizens and implements the Fourteenth Amendment.

a claim for relief within the jurisdiction of the federal courts. It does not matter that the discrimination was produced by discriminatory official action and not by a law commanding segregation. [2] Indeed, the federal courts will afford a remedy even though a denial of equal treatment is also in defiance of state law. [3]

The District Court seems to have proceeded upon the assumption either that the complaint adequately alleged an unconstitutional practice, or that it was not necessary to decide this issue (R. 18-19; 199 F. Supp. at 403). However, the Court of Appeals' opinion contains language critical of the complaint (R. 28; 305 F. 2d at 785), and a statement that it "does not allege school board policies which are unconstitutional in themselves" (R. 29; 305 F. 2d 786). This criticism had reference to plaintiffs' claim that the defendants had manipulated school attendance areas on a racial basis to establish an all Negro attendance area, and not to the claim of racial segregation of pupils within the Chenot School building, which the opinion does not discuss. With respect to the former claim, the complaint alleged not only that the Chenot School "attendance area boundaries were so drawn as to make it an exclusively Negro school * * *" (R. 5), but also that when the school

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[2] 28 U.S.C. §1343(3) and 42 U.S.C. §1983 are addressed to regulations, customs or usages as well as to statutes and ordinances. Discriminatory administration of a law fair on its face is constitutionally forbidden. *Yick Wo* v. *Hopkins*, 118 U.S. 356.

[3] *Monroe* v. *Pape*, 365 U.S. 167. Illinois has various laws prohibiting racial discrimination in public schools and other public and privately owned facilities: Smith-Hurd Ann. Stats., Ch. 122, §§22-11, 22-12, 10-22.5, 18-12, 34-18, 24-4 and Smith-Hurd Ann. Stats. (Special pamphlet, Criminal Code of 1961), Ch. 38, §§13-1 to 13-4.

was put in operation "all or practically all the children of elementary school age who resided in the Chenot attendance area were Negroes, *a result intentionally achieved by the Defendants* by the manner in which the Chenot attendance boundaries were drawn, *in pursuance of a plan to make Chenot School an all-Negro school in student enrollment*" (R. 6; emphasis supplied); and further that defendants have created and are maintaining racially segregated schools "as a result of the schemes, plans and contrivances of the Defendants in drawing the boundary lines of the attendance areas of the schools" (R. 9). It is submitted that this is fully sufficient to constitute the "short and plain statement of the claim" required by the Federal Rules of Civil Procedure in order to give fair notice of plaintiffs' claim and the grounds upon which it rests. No more "specific facts to support * * * [the] general allegations of discrimination" were required. *Conley* v. *Gibson*, 355 U.S. 41, 47. Obviously a manipulation of school attendance areas on a racial basis violates the principles of *Brown* v. *Board of Education*, 347 U.S. 483. See *Taylor* v. *Board of Education of City of New Rochelle*, 191 F. Supp. 181, 192 (S.D. N.Y. 1961), app. dismissed, 288 F. 2d 600 (2nd Cir. 1961); 195 F. Supp. 231 (S.D. N.Y. 1961); aff'd 294 F. 2d 36 (2nd Cir. 1961), cert. den. 368 U.S. 940 (gerrymandering of school areas); cf. *Wheeler* v. *Durham City Board of Education*, 309 F. 2d 630, 632 (4th Cir. 1962) (dual racial attendance areas) and cases cited therein. Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339. Similarly, allegations that Negro pupils are intentionally separated by race from white pupils within the Chenot School in separate classrooms, and required, as part of a segregation policy, to use separate entrances to and exits from the building (R. 3) would, if established, justify relief as an infringement of constitutional rights. See, *McLaurin* v. *Oklahoma*

State Regents, 339 U.S. 637; cf. *McCoy* v. *Greensboro City Board of Ed.*, 283 F. 2d 667 (4th Cir. 1960) (separate buildings for Negro and white pupils on single elementary school campus).

Plaintiffs submit that the District Court plainly had jurisdiction and that the complaint adequately alleged racial discrimination by state officials in violation of the Fourteenth Amendment. This being true, it was error for the trial court to dismiss the case because of an alleged failure to exhaust administrative remedies. Petitioners urge in parts B and C of the Argument, *infra*, that the particular procedures available to them are inadequate and need not be exhausted in any event. But, notwithstanding any issue as to adequacy, since the court had jurisdiction of the claim and it was properly alleged that a deprivation of constitutional rights had already occurred and was continuing, the court should have retained jurisdiction rather than dismissing the case. If a court should determine, as a matter of equitable discretion, giving due consideration to the presence or absence of emergency factors, or other matters affecting the balance of equities, that final determination of the claim should be deferred pending pursuit of adequate local procedures (and petitioners contend that this would not have been justified here), then at the very least the court should retain jurisdiction of the case pending such action.

The history of the Civil Rights Act of 1871, upon which jurisdiction here rests, makes it plain that Congress gave the federal courts a primary duty to provide relief for Fourteenth Amendment violations, independent of any state remedies. *Monroe* v. *Pape*, 365 U.S. 167, 183. The opinion below rests upon the contrary assumption that exhaustion of state remedies is jurisdictional and an abso-

lute prerequisite to the exercise of federal judicial powers. This view would result in complete abdication of federal judicial responsibility, depriving petitioners of a federal trial forum completely and remitting them to remedies made available by the state.

Several courts of appeals decisions are in accord with the view that once a claim for relief is stated, the federal courts have the power to proceed to adjudicate the claims before them without requiring exhaustion. See *Borders* v. *Rippy*, 247 F. 2d 268 (5th Cir. 1957); *Carter* v. *School Board of Arlington County*, 182 F. 2d 531 (4th Cir. 1950).(*)

(*) The Circuit Courts have generally recognized that exhaustion is not an absolute requirement, frequently granting relief in various circumstances to parties who had either not completely exhausted administrative remedies or had not sought them at all. See *Mannings* v. *Board of Public Instruction*, 277 F. 2d 370 (5th Cir. 1960); *Northcross* v. *Board of Education*, 302 F. 2d 818 (6th Cir. 1962), cert. den. 370 U.S. 944; *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (5th Cir. 1957), cert. den. 354 U.S. 921; *Jackson* v. *Rawdon*, 235 F. 2d 93 (5th Cir. 1956); cert. den. 352 U.S. 925; *Gibson* v. *Board of Public Instruction*, 272 F. 2d 763 (5th Cir. 1959); *Marsh* v. *County School Board of Roanoke County*, 305 F. 2d 94 (4th Cir. 1962); *Green* v. *School Board of City of Roanoke*, 304 F. 2d 118 (4th Cir. 1962); *Jeffers* v. *Whitley*, 309 F. 2d 621 (4th Cir. 1962); *Wheeler* v. *Durham City Board of Education*, 309 F. 2d 630 (4th Cir. 1962); *School Board, etc.* v. *Allen*, 240 F. 2d 59 (4th Cir. 1956); *Bruce* v. *Stilwell*, 206 F. 2d 554 (5th Cir. 1953); *School Bd. of Newport News* v. *Atkins*, 246 F. 2d 325 (4th Cir. 1957); *Holland* v. *Bd. of Pub. Instr.*, 258 F. 2d 730 (5th Cir. 1958); *St. Helena Parish School Bd.* v. *Hall*, 287 F. 2d 376 (5th Cir. 1961); *Romero* v. *Weakley*, 226 F. 2d 399 (9th Cir. 1955) Cf. *Browder* v. *Gale*, 142 F. Supp. 707, Aff'd. Per Curiam 352 U.S. 903.

Even in *Carson* v. *Warlick*, 238 F. 2d 724 (4th Cir. 1956), cert. den. 353 U.S. 910, a case strongly relied upon by the Court below, the plaintiffs had been given an opportunity to exhaust the available remedies and had declined to do so before the case was dismissed. See *Carson* v. *Board of Education*, 227 F. 2d 789 (4th Cir. 1955). In *Parham* v. *Dove*, 271 F. 2d 132 (8th Cir. 1959) and *Mannings* v. *Board of Public Instruction*, 277 F. 2d 370 (5th Cir. 1960), the courts determined that plaintiffs should be granted at least the protection of general injunctive orders against discrimination before being required to submit to administrative procedures.

A similar practice has prevailed in the development of the judicially-created equitable abstention doctrine where this Court has required trial courts to retain jurisdiction over properly stated claims, even where they withheld relief pending the resolution of doubtful issues as to the applicability of state laws. This insures that the courts can exercise their power to protect aggrieved parties while the case develops. *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 179; *Government and Civic Employees Organizing Committee* v. *Windsor*, 353 U.S. 364.

B.

ILLINOIS HAS NOT PROVIDED ANY REASONABLY EXPEDITIOUS, ADEQUATE, OR EFFECTIVE ADMINISTRATIVE REMEDY TO CURE THE DISCRIMINATION ALLEGED BY PETITIONERS TO EXIST.

Petitioners submit that the holdings that Ch. 122, §22-19 of the Illinois School Code of 1961 provides an adequate administrative remedy are erroneous. Neither court below has pointed to any provision of law which gives the Superintendent of Public Instruction power to correct the practices of the local school officials complained of in this case. Section 22-19 conspicuously fails to give the Superintendent of Public Instruction power to make an order of any kind requiring local school officials to take any action or refrain from any action with respect to racial discrimination. The School Code grants to local school boards the power to assign pupils and prohibits them from excluding pupils from schools on the basis of race (Ch. 122, §10-22.5). But with the exception of §22-19, and one other statute also not providing any direct powers, [5] the laws defining the powers and duties of the Superintendent of Public Instruction grant no express authority relating to assigning pupils to schools or correcting racial segregation of pupils. [6]

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[5] The other exception is Ch. 122, §18-12, which provides that the Superintendent not disburse certain state funds to a local board unless he obtains from its clerk or secretary an affidavit that the district is complying with the provisions of Ch. 122, §10-22.5 prohibiting discrimination. There is nothing in either §18-12 or §22-19 to indicate that the Superintendent can withhold these funds if he does receive such an affidavit from the local officials.

[6] The general powers and duties of the Superintendent are set out in Ch. 122, §§2-3 to 2-3.34.

Section 22-19 directly limits the Superintendent to deciding, following a hearing, whether allegations of discrimination "are substantially correct." If he so finds he "shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of." Thus, the only function of the Superintendent is to conduct a hearing, conclude whether a complaint is substantially correct, and request that the State's chief legal officer begin a lawsuit against a school board found to be practicing discrimination. The statute does not authorize the Superintendent to order a local school board to stop such practices or give him any sanctions to enforce such an order. He can merely ask that a lawsuit be filed.

Through this stage of the process contemplated by the statute, it is readily apparent that it is not possible for an aggrieved party to secure any relief. The court below asserted that the Superintendent might "cause an adjustment" of the complaint, but it recognized his lack of power under the School Code (R. 29-30, 305 F. 2d at 786). Perhaps the Court had in mind that the Superintendent might exercise a persuasive influence on local authorities, although §22-19 does not even direct him to make conciliatory efforts. Any prestigious state official or even a private citizen *might* have sufficient influence to persuade the school board to abandon discrimination. This possibility is no substitute for an administrative power to decide and settle disputes.

This statutory proceeding requiring a hearing before a powerless state officer is at least as futile as a plea to an administrative agency stalemated by internal disagreement (*Order of Railway Conductors of America* v. *Swan*, 329 U.S. 520, 524), or a plea to an agency bound to deny

relief because of a controlling regulation of its executive superior (*Waite* v. *Macy*, 246 U.S. 606) or a controlling judicial decision (*Montana Nat. Bank of Billings* v. *Yellowstone County*, 276 U.S. 499, 505). In none of these cases has the Court required exhaustion, recognizing that futile procedures should not be required. In several school segregation cases the Fourth Circuit has refused to require exhaustion of administrative remedies where the agency had a "fixed and definite policy" in opposition to the claim for relief. *School Bd. of City of Newport News* v. *Atkins*, 246 F. 2d 325 (4th Cir. 1957), cert. den. 355 U.S. 855; *School Bd. of City of Charlottesville* v. *Allen*, 240 F. 2d 59 (4th Cir. 1956), cert. den. 353 U.S. 910; *Farley* v. *Turner*, 281 F. 2d 131 (4th Cir. 1960).

This Court's decision in *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 210, furnishes a close precedent for the instant case. The Court refused to require the United States to pursue a process closely analogous to that available here as a prerequisite to an action to restrain violations of the Sherman Act. The asserted remedy consisted of an investigation by the Federal Trade Commission, a recommendation that the offender readjust its business if violations were found, and upon a failure to comply with such recommendations a reference of the matter to the Attorney General for such action as he might deem proper (325 U.S. at 199-200). This court rejected an argument that equity should not interfere in advance of this process saying:

> • • • the only function of the Federal Trade Commission under §5 of the Webb-Pomerene Act is to investigate, recommend and report. It can give no remedy. It can make no controlling finding of law or fact. Its recommendation need not be followed by any court or administrative officer or executive officer. (325 U.S. at 210.)

The present case is equally, if not more, compelling. Under §22-19 the Superintendent can give no remedy, can make no controlling finding of law or fact, is not even authorized to make a recommendation to the offender, and cannot enforce any request that a lawsuit be filed. [7] The court below said that the Superintendent had "no judicial power" and that his findings of fact on the issue of segregation are "not binding in a suit at law or in equity" (R. 30; 305 F. 2d at 786).[8]

The possible procedures which remain after a determination by the Superintendent are all plainly *judicial* in nature. They are also subject to so much doubt, uncertainty, and discretion, as to be inadequate remedies. This is true whether or not the Superintendent finds that the complaint of discrimination is substantially correct.

If the Superintendent does so find, nothing in §22-19 requires the Attorney General to commence a lawsuit.

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[7] In the *U. S. Alkali Export Ass'n.* situation, the Attorney General would presumably follow any eventual F.T.C. recommendation that he file a lawsuit, since he had done so in advance of a recommendation. There can be no similar assumption that the Illinois Attorney General would agree to prosecute petitioners' grievance.

[8] This much of the holding seems plainly correct. The possible effect of the Superintendent's findings in a proceeding by either party under the Illinois Administrative Review Act (Ch. 110, §264, et seq.) to review the Superintendent's decision (to ask or not to ask the Attorney General to file suit) is an entirely different matter. Although, as the discussion below indicates, the Attorney General's authority to bring an action in the circuit courts "for injunctive or other relief" is questionable, there is no reason to believe that the statute contemplates anything other than a conventional lawsuit with ordinary judicial fact-finding methods.

This decision is left to the discretion of the Attorney General. But, even worse, Illinois law leaves substantial doubt as to whether the Attorney General has any power to bring an action capable of rectifying the practices complained of. It is doubtful that §22-19 grants this authority to the Attorney General, as there is no explicit authorization in this statute. Whether an attorney general might find such authority conferred by implication, and the Illinois courts would support him, cannot be forecast. A search of Illinois statutes reveals no other authorization for the Attorney General to bring an injunction suit against a school board.[9] The laws which do give the Attorney General powers with respect to civil rights violations give no hint of any authority to seek injunctive relief against a school board to remedy discrimination.[10]

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[9] Smith-Hurd Ann. Stats. Ch. 14, §4, providing the general duties of the Attorney General, sheds no light on the issue.

[10] Smith-Hurd Ann. Stats. (Special Pamphlet, Criminal Code of 1961), Ch. 38, §§13-1 to 13-4. Presumably the Attorney General could bring *criminal* proceedings against a school official for a violation of civil rights as defined in Ch. 38, §§13-1(c), 13-2(c), 13-3(a). It is also conceivable, though not so clear, that the Attorney General could institute an administrative proceeding (also subject to judicial review) to remove an official from office for a civil rights violation under Ch. 38, §13-3(d). However, the availability of an injunctive remedy pursuant to §13-3(c) is subject to grave doubts. That provision authorizes the Attorney General to bring injunctive proceedings against "places of public accommodation and amusement" (as defined in detail in §13-1(a)), labeling racial discrimination a "public nuisance." But there is no mention of injunctive relief against discrimination by officials, or in governmental institutions, or any places not enumerated in the law.

And, of course, none of the laws indicate that the Attorney General is empowered to bring a suit to protect the federal constitutional rights of an aggrieved person against a state officer, as distinguished from protecting the right to equal treatment under Illinois law.

Notwithstanding the possibility that some such power of the Attorney General might be found somewhere, the state of the law creates grave doubt as to the availability of any judicial remedy. This doubt renders any remedy so uncertain and speculative that petitioners' federal rights can be fully protected only if the District Court exercises its jurisdiction to protect those rights. This conclusion accords with *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 625, where it was unclear, in part because of possibly conflicting state court decisions, whether a litigant's federal right to nondiscriminatory treatment under state tax laws could be protected in state proceedings. This Court approved the grant of declaratory relief.[11] In the instant case, uncertainty as to the protection of the federal rights is manifest because the Attorney General has discretion to refuse to file a case, and because the statute's lack of clarity beclouds whether such an action may be brought.

More fundamentally, even if a state injunctive remedy were clearly available in a suit by the Attorney General, any such remedy in the "appropriate circuit court" under §22-19 would be judicial, rather than administrative or

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[11] Relief was granted notwithstanding *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, which held that the policy of the "Johnson Act of 1937" (now 28 U.S.C. §1341), prohibiting injunctions against state tax collections if there was a "plain, speedy and efficient remedy" in the state courts, governed the exercise of discretion in declaratory judgment cases involving state taxes.

legislative. This Court often has held that a party may not be required to submit his claim to state judicial remedies where Congress has granted the federal courts jurisdiction. *Lane* v. *Wilson*, 307 U.S. 268, 274-275, applied this principle to the jurisdiction of the federal courts under the civil rights laws.[12] See also *City Bank Farmers Trust Co.* v. *Schnader*, 291 U.S. 24, 30; *Prendergast* v. *New York Telph. Co.*, 262 U.S. 43, 48; *Bacon* v. *Rutland R. Co.*, 232 U.S. 134; *Pacific Teleph. & Teleg. Co.* v. *Kuykendall*, 265 U.S. 196, 200-201; cf. *Prentis* v. *Atlantic Coast Line R. Co.*, 211 U.S. 210, 228. The principle has been applied in school segregation cases by lower federal courts relying on *Lane* v. *Wilson*, *supra*. See, e.g., *Carson* v. *Warlick*, 238 F. 2d 724, 729 (4th Cir. 1956), cert. den. 353 U.S. 910; *Dove* v. *Parham*, 282 F. 2d 256 (8th Cir. 1960).

It would be paradoxical to permit a litigant to ignore state judicial remedies available to him personally, but require him to forego his federal forum in favor of a state court action to be conducted by an official of the same state government which he asserts is infringing his constitutional rights. It might be argued that if an aggrieved person feared to stand aside from the litigation, not trusting prosecution of his rights by state officials, he might seek to intervene in the state court proceedings. This might be possible under the Illinois Civil Practice Act (Smith-Hurd Ann. Stats. Ch. 110, §26.1). Intervention, however, would bar litigation of the same claim in the federal courts. *Grubb* v. *Public Utilities Commission*, 281 U.S. 470; *Detroit & Mackinac R. Co.* v. *Michigan Railroad Comm.*, 235 U.S. 402. Thus Illinois offers petitioners the al-

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[12] Jurisdiction in that case was founded on R.S. §1979, now 42 U.S.C. §1983.

ternatives of standing aside while their claim is litigated by others in the state courts, with the hope that an unfavorable adjudication would not bar their eventual return to the federal forum, or of sacrificing the federal trial forum altogether and seeking intervention in the state court proceedings. A Court of equity should not impose such unsatisfactory alternatives where Congress has plainly granted jurisdiction to vindicate federal constitutional rights.

Of course, if the Superintendent of Public Instruction, having conducted a hearing pursuant to §22-19, refuses to request that the Attorney General file a lawsuit, still another state judicial proceeding is required by the statute, i.e., a judicial review of this decision under Illinois' "Administrative Review Act" (Smith-Hurd Ann. Stats. Ch. 110, §264, et seq.). This lawsuit to require the Superintendent of Public Instruction to ask the Attorney General to bring a lawsuit (which the Attorney General may refuse to bring even if requested) is also clearly a judicial proceeding. This has been expressly decided by the Illinois Supreme Court which has held that the functioning of its courts under the Administrative Review Act does not offend the principle of separation of powers since the proceedings are "essentially judicial in character." *Harrison* v. *Civil Service Commission*, 1 Ill. 2d 137, 115 N.E. 2d 521, 526 (1953).[13] Thus, the rule of *Lane* v. *Wilson*, and the

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[13] In the *Harrison* case, *supra*, the court also said that these are proceedings which have "traditionally been regarded as a judicial function" and that the scope of review was "comparable to the issue at law as to whether there is competent evidence to support a judgment of a lower court." The statute has all the indicia of providing a judicial remedy, including the provisions relating to the

other cases cited above at p. 27, would also apply to this process.

Of course, a school board dissatisfied with a determination by the Superintendent that a complaint against it was "substantially correct" could also appeal to the state court under the "Administrative Review Act" in an attempt to prevent his making a request to the Attorney General. The complainant at the Superintendent's hearing would have to be made a defendant (Ch. 110, §271). The potentials of §22-19 for involving someone whose constitutional rights have been denied in profitless proceedings in which no meaningful relief possibly can be obtained are seemingly infinite.

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(12) *Continued*

scope of review (Ch. 110, §274); providing the power of the trial court (§275); providing for appellate review (§276); governing the pleadings (§267); the service of process (§269); jurisdiction and venue (§268); and the applicability of the Illinois Civil Practice Act (§277).

C.

THE ILLINOIS STATUTE (CH. 122, §22-19) UNREASONABLY CONDITIONS THE COMMENCEMENT OF A PROCEEDING BY REQUIRING AN AGGRIEVED PARTY TO OBTAIN THE SIGNATURES OF 50 PERSONS ON HIS COMPLAINT, THUS FAILING TO GIVE DUE PROTECTION TO PERSONAL CONSTITUTIONAL RIGHTS.

In addition to all the infirmities of §22-19 discussed above, the statute includes a requirement which is completely alien to the accepted principle that Fourteenth Amendment rights are personal to the individual. Section 22-19 provides that the Superintendent "*shall*" hold a hearing if "at least 50 residents of a school district or 10%, whichever is lesser"[14] execute and file a complaint alleging discrimination against "any pupil" or "any employee • • • or applicant for employment." The statute goes on to provide that the Superintendent "*may* also fix a date for a hearing wherever he has reason to believe that such discrimination may exist in any school district" (emphasis supplied).

The court below upheld the 50 signature requirement as "reasonable," commenting that petitioners alleged no unsuccessful effort to obtain 50 signatures or to persuade the Superintendent of Public Instruction to initiate a hearing, and that if the remedy was denied "in practice" to an individual "he may then turn to the Federal Courts" (R. 30; 305 F. 2d at 786).

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[14] The 10% rule would not apply in Community Unit School District No. 187 which has far more than 500 residents. According to the complaint 505 pupils (251 Negroes and 254 whites) attend the Chenot School alone (R. 7).

It is submitted that this engrafts a condition upon the availability of the federal courts to protect constitutional rights which is not reasonable, equitable, or in accordance with the jurisdictional statutes.

First, it is a familiar principle that the right of a pupil to be free from racial segregation or discrimination in public schools is a personal and individual right. This right should not be made to depend upon the desire of other persons to assert their similar rights. *Brown* v. *Board of Education*, 347 U.S. 483; 349 U.S. 294, 300; *Sweatt* v. *Painter*, 339 U.S. 629, 635; *Sipuel* v. *Board of Regents*, 332 U.S. 631, 633; *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337; cf. *McCabe* v. *Atchison T. & S. F. R. Co.*, 235 U.S. 151, 161-162; *Shelley* v. *Kraemer*, 334 U.S. 1, 22; *Oyama* v. *California*, 332 U.S. 633. Nor can the grant of such rights be made legally dependent upon the consent of a community majority such as by an election. *Boson* v. *Rippy*, 285 F. 2d 43, 45 (5th Cir. 1960); *Taylor* v. *Bd. of Ed. of City of New Rochelle*, 191 F. Supp. 181, 197 (S.D. N.Y. 1961); cf. *People* v. *Western Union Telegraph Co.*, 70 Colo. 90, 97-99, 198 Pac. 146, 149 (1921) (holding invalid a provision for review of judicial decisions by referendum). Cf. *Cooper* v. *Aaron*, 358 U.S. 1.

Additionally, Congress has opened the federal courts to suits by *individuals* for the redress of their personal rights under the Fourteenth Amendment, enacting in 28 U.S.C. §1343 that the courts have jurisdiction of civil actions by "any person," and providing for civil liability under 42 U.S.C. §1983 to "any citizen of the United States or other person within the jurisdiction thereof." The right of a single individual to access to the courts is not altered by the fact that he may seek relief broad enough to protect those similarly situated in a class action under Rule

23(a)(3), Federal Rules of Civil Procedure. Rule 23 provides for representation by such members of a class *"one or more,* as will fairly ensure the adequate representation of all" (emphasis supplied).

Compliance or attempted compliance with the fifty signature rule imposes a burden on an individual seeking redress of a constitutional violation far in excess of that required by the applicable federal statutes and rules which allow any individual to proceed alone to protect his rights. The fifty signatures requirement has no rational relationship to the purported function of the proceeding under §22-19 to vindicate the rights of "any pupil". The statute does not represent a legislative judgment that the administrative process be made available only if the rights of many are involved, but merely a judgment that it be made available only if one whose rights are involved can persuade other people to join in a protest against his treatment. The scheme of the statute is not to fix an arbitrary number to secure adequate representation of a class. There is no requirement that all or any of the 50 signers have any grievance involving their own rights. They need not even be parents of pupils in schools. The only requirement is that the signers reside in the school district.

The suggestion by the court below that petitioners should have attempted to persuade the Superintendent to initiate a hearing if they could not obtain 50 signatures does not justify the decision to dismiss the case. The Superintendent plainly had a discretion to grant or deny such a request, there being no reason to believe that the word "may" in the statute really means "must". Since the grant of a hearing without 50 signatures is purely discretionary, no request for it should be required before resort to the courts. This court has applied an analogous principle in

declining to require requests for rehearing of administrative decisions where the grant of rehearing is discretionary and not a matter of right. *Levers* v. *Anderson*, 326 U.S. 219; *Prendergast* v. *New York Tel. Co.*, 262 U.S. 43, 48.

There is additional uncertainty as to the rights of an aggrieved party in any hearing which is initiated by the Superintendent and is not founded upon a complaint meeting the 50 signature requirement. Even the provision in §22-19 for notice of the time and place of the hearing only requires that it be given to "the secretary or clerk of the school board and to the *first subscriber to such complaint*." The phrase "such complaint" would seem to refer only to a complaint filed in accordance with the statutory requirement of 50 signatures as this is the only complaint mentioned in the law. There is a similar statutory failure to specify the rights of an aggrieved person to representation by counsel, cross examination, etc., in a proceeding initiated by the Superintendent of Public Instruction. It is not clear whether one must be a signatory to a complaint meeting the 50 signature requirement in order to be a "party" or a "complainant" and thereby obtain standing at the hearing.

Here again there is "such uncertainty surrounding the adequacy of the state remedy as to justify the District Court in retaining jurisdiction of the cause." *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 625. In the last mentioned case a part of the state remedy involved was "not a matter of right, but purely discretionary" (*Ibid.*). This was part of the basis for the holding that the remedy was too uncertain and speculative to be "plain, speedy and efficient," and that equity principles did not require exhaustion of the remedy.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

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